UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE – OPELOUSAS DIVISION

UNITED STATES OF AMERICA and STATE OF LOUISIANA,	*	**CIVIL ACTION NO. 2:08-cv-00893-RTH-PJH**
Plaintiffs,	*	**JUDGE HAIK**
V.	*	**MAGISTRATE HANNA**
CITGO PETROLEUM CORPORATION	*	
Defendant.	*	

POST-APPEAL REMAND BRIEF

Respectfully Submitted,

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INTRODUCTION

Nothing in the U.S.'s brief supports the vastly increased penalty it requests. This Court's ruling, after a two-week trial, was upheld on appeal in many respects. In view of the totality of the evidence and consideration of all penalty factors, this Court found a $6 million penalty to be appropriate. While the Fifth Circuit remanded the case on discrete issues – to approximate the amount of economic benefit, to reconsider gross versus ordinary negligence and to reconsider the penalty amount in view of any new findings – the Fifth Circuit did not mandate a different penalty determination. And the trial court record fully supports the $6 million penalty that this Court ordered.

First, the U.S. failed to present any evidence of CITGO's alleged economic benefit that complies with the legal standard – the least cost means of preventing the spill. Instead, the government argues that a litany of improvements should have been made 12 years before the spill without any evidence that these improvements were required by that date to prevent the spill. The U.S. has even gone so far to submit new calculations – which include items in the economic benefit analysis that were not presented at trial and a new time period for its calculations. This is totally improper. The parties did not seek – and the Court did not authorize – new evidentiary submissions. But even the improperly submitted new calculations fail to present least-cost alternatives. This is a fatal flaw in the government's evidence and its calculations should be disregarded. Only CITGO presented least-cost alternative calculations that can properly be considered by the Court.

Moreover, the U.S. present-valued its calculations using a discount rate based on the cost of capital of three publicly traded companies – which was nearly three times higher than CITGO's real-world cost of capital – and that dramatically inflates its economic-benefit computations. There is no economic or legal basis for using a rate other than CITGO's cost of

capital.

In addition, the U.S's economic-benefit analysis considers only CITGO's alleged avoided costs, ignoring the substantial expenses incurred by CITGO resulting from the spill. In reality, whatever savings CITGO had are outweighed by its costs, including the $13 million criminal fine, spill response costs, and legal costs. At trial, CITGO showed that it had $29 million in post-spill costs that were unreimbursed by insurance – a calculation uncontested by the U.S. That figure does not include the $7 million incurred by CITGO to comply with the Environmental Compliance Plan entered into with the government as part of its criminal plea, the injunctive relief measures ordered by this Court, which the U.S.'s expert estimated at trial would cost $30 million (and which are expected to cost closer to $40 million), or the $3 million penalty this Court ordered CITGO to pay to the State of Louisiana, which neither CITGO nor the State appealed. CITGO's costs outweigh any proper calculation of its economic benefit.

Second, this Court properly found that CITGO did not commit gross negligence in its design, construction, maintenance and operation of its waste water treatment unit ("WWTU"). CITGO built a state-of-the art facility in 1994 based on a conservative design standard and made periodic upgrades to the facility over the years. Contrary to the U.S.'s contentions, CITGO did not ignore consultants' recommendations about waste water capacity and, while the third storage tank should have been completed before the spill, the delay was not a result of gross negligence or willful misconduct. Even at the time of the spill, CITGO had sufficient capacity, including its secondary containment area that it had paved in 1998, to hold the oil on CITGO's property. The oil spill resulted from a chain of improbable events, including a massive rainfall and an underground escape route for the oil that was available only because CITGO was doing the right thing and installing a tank to increase waste water capacity at the time. Had CITGO known

significant quantities of oil had accumulated – or knew the risk that oil could exit from beneath the containment area – it could have and would have taken corrective measures. But it lacked this knowledge and its conduct, while negligent, was not grossly negligent or willful.

Third, the Fifth Circuit affirmed this Court's consideration of most of the other CWA penalty factors. Yet, throughout its brief, the government ignores this Court's findings that went undisturbed on appeal in an effort to re-try every issue that it lost at trial. Evaluation of all of the penalty factors, including CITGO's effective response efforts and the minimal environmental impact, supports the Court's original penalty determination. In addition, CITGO has been penalized significantly for the spill and is spending a considerable sum to comply with this Court's injunctive relief. As this Court said in ordering those measures, "[t]he most important thing to do at this point in the situation is to avoid it happening again." District Court Judgment ("Judgment") at p. 11. In view of the totality of the evidence, that goal is served without any greater penalty.

I. The Economic-Benefit Penalty Factor Supports This Court's Penalty Determination

The U.S.'s computation of economic benefit is legally deficient and, therefore, should be disregarded by the Court. In addition, while the Fifth Circuit remanded the case to this Court to make "a reasonable approximation of economic benefit," it stated that it had "never held that a particular approach must be followed" and did not "decide otherwise" here. *United States, ex rel. Administrator of E.P.A. v. CITGO Petroleum Corp.*, 723 F.3d 547, 552 (5th Cir. 2013). So the Court is not required, as the U.S. suggests, to use an economic-benefit calculation as a penalty floor. *See Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York*, 451 F.3d 77, 88 (2d Cir. 2006) (affirming district court's finding that while defendant obtained some economic benefit, this was "neither a mitigating factor nor a cause for increased penalties").

Even if the Court chose to do so, however, the floor would be orders of magnitude lower than the U.S.'s flawed calculations.

A. The United States failed to show the least cost means of avoiding the spill, making its economic-benefit calculations legally flawed and of no use to the Court.

Under the CWA, "economic benefit" means the least-cost means to comply with the law. *U.S. v. Allegheny Ludlum Corp.*, 366 F.3d 164, 185 (3d Cir. 2004); *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 611 F. Supp. 1542, 1563 n. 25 (E.D. Va. 1985), *rev'd on other grounds*, 484 U.S. 49 (1987); *United States v. WCI Steel, Inc.*, 72 F. Supp. 2d 810 (N.D. Ohio 1999). The economic-benefit penalty factor is meant "to prevent a party violating the CWA from gaining an unfair advantage against its competitors, and to prevent it from profiting from its wrongdoing." *Allegheny Ludlum Corp.*, 366 F.3d at 177-78. A contrary rule – one that would allow inclusion of projects that were unnecessary to avoid the violation – would fail to promote the goal of "level[ing] the playing field" and, instead, would unduly penalize defendants. *Allegheny Ludlum Corp.*, 366 F.3d at 177; *See Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F. Supp. 1368, 1388 (D. Haw. 1993) (declining to find that city saved $2.5 million by delaying expansion of municipal treatment plant when evidence showed that installation of wooden weir prevented illegal bypasses).

The U.S.'s contention that CITGO obtained $83 million of economic benefit cannot be squared with this legal standard. Robert Harris, plaintiffs' expert on economic benefit, agreed that the least-cost means of compliance is the correct way to compute benefit. Trial Transcript ("Tr. Trans.") at 1241:2-24. But he conceded that he did not know whether he had made a least-cost calculation. Tr. Trans. at 1241:25-1242:6. He did not know because the U.S.'s engineering expert who provided the assumptions that went into Harris's calculations, Gary Amendola,

offered no opinion that all of his recommendations were required to prevent the spill. Nor did he provide any time period by which his recommended measures had to have been implemented to prevent the spill.

Harris therefore incorrectly assumed that all of Amendola's recommendations were required to have been implemented in 1994 when CITGO built its waste water treatment unit. The least-cost method should include only items required to have prevented the violation, here, the spill. Harris's calculations are therefore contrary to the legal standard and should be rejected by this Court.

In its remand brief, the government argues for the first time that all of the equipment ordered by this Court as injunctive relief should now be viewed as necessary to have avoided the spill, and that those measures should have been implemented in their entirety in 1994 or in 1996. Government Post-Remand Brief ("Gov. Br.") Gov. Br. at pp. 12-17. Further, the U.S. includes $23 million of alleged cost savings on sludge removal that it failed to include in its calculation at trial. And, perhaps trying to repair its deficient calculations, the U.S. for the first time includes computations going back to 1996 as an alternative to 1994. These back-door evidentiary submissions – which have not been subject to discovery, analysis by CITGO's experts or cross examination and are unauthorized by the Court – are completely improper and should be disregarded. Even if the evidence were considered, however, it suffers from the same problem as the evidence presented at trial: It is not a least-cost calculation and, thus, contrary to law.

At best, the U.S. points to some evidence that CITGO should have upgraded its WWTU sooner than it did. But that is not the issue in calculating economic benefit under the least-cost means of preventing the spill. Moreover, the U.S. ignores this Court's finding that CITGO's WWTU was adequate when it was built in 1994, a finding supported by evidence that it was a

state-of-the-art and conservative design (24 hour/25-year rain event), which had sufficient storage capacity to handle the projected storm water flows. Tr. Trans. at 1851:23-1853:16; 1856:2-15. There was no legal or regulatory requirement that CITGO have a certain number of tanks or specified amount of waste water capacity. Tr. Trans. at 1504:6-20. And the evidence showed that CITGO operated the unit for 12 years, 1994 through 2006, without any oil spills to waterways. Tr. Trans. at 1503:19-1504:20.

At trial, only CITGO presented evidence of the least-cost means of preventing the spill, providing various options, including (1) removing the oil from the tanks and sealing the underground junction box and (2) completing the third storm water tank in 2005 to coincide with the startup of the refinery's new crude processing unit. The U.S., on the other hand, presented no evidence that WWTU improvements it advocated were needed by 1994 or 1996 (or any specific time before 2006) to prevent a 2006 spill. Accordingly, by failing to present legally viable economic-benefit calculations, the government failed to present an essential element of its penalty case. By calculating 10 or 12 years of economic benefit from the original construction of the waste water treatment unit – the avoided expense compounded at 10% interest annually – the U.S. effectively calculated the most expensive – not the least expensive – means of avoiding the spill. This approach is contrary to law, and the Court should disregard the government's improper calculations.[1]

[1] Moreover, there is another limitation on the U.S.'s calculation that shows it has failed to arrive at a least-cost economic benefit. The CWA's five-year statute of limitations bars consideration of economic benefit "which is alleged to have occurred prior to the statute of limitations period." *U.S. v. Conagra, Inc.*, No. 96-123, 1997 WL 33545777, at *24-25 (D. Idaho December 31, 1997). Absent such a limitation, the government could circumvent the five-year rule by "increas[ing] the potential penalty for [] timely claims through the introduction of evidence of stale claims." *Id.* at 25; *see also Sierra Club v. El Paso Gold Mines, Inc.*, No. 01-2163, 2003 WL 25265873 at *7 (D. Colo. Feb. 10, 2003) (limiting economic-benefit analysis to period from trial date to five years before suit); *Atl. States Legal Foundation v. Universal Tool Stamping, Inc.*, 786 F. Supp. 743, 749-51 (N.D. Ind. 1992) (limiting analysis of economic benefit to five years despite more than ten years of violations).

B. The United States used an inflated discount rate to calculate economic benefit.

The U.S.'s expert, Robert Harris, used an inflated 10% discount rate to calculate the time value of CITGO's allegedly improper cost savings, which results in vastly overstating economic benefit.[2] While the U.S. agrees that CITGO's cost of capital is the appropriate metric for determining the discount rate to present-value economic benefit, Harris failed to calculate CITGO's actual cost of capital – as CITGO's expert did – and, instead, used the weighted average cost of capital of three different companies (Exxon, Valero, and Tesoro) as a proxy for CITGO's. The evidence did not support use of this rate for CITGO.

While Exxon, Valero, and Tesoro are publicly traded and raise capital by selling stock, CITGO is privately held by a single owner and raises capital by incurring debt, not by issuing stock. Tr. Trans. at 2706:16-22. Equating these companies' costs of capital with CITGO's does not comport with financial reality. Tr. Trans. at 2705:25-2706:15. As Charles Finch, CITGO's expert economist testified, CITGO's actual cost of capital is most accurately represented by the after-tax interest rate its pays on its debt. Tr. Trans. at 2707:2-20. Using CITGO's 1994 after-tax debt rate of 3.63% yields a substantially reduced economic benefit calculation (from $83 million to $14.7 million) even accepting all of Harris's assumptions. Tr. Trans. 2720:2-25; D-1849.

The U.S. did not contest Finch's calculations, including his calculation of CITGO's debt rate. And Harris's failure to use CITGO's cost of capital is improper because "a more accurate calculation could easily have been achieved by using figures specific to [the defendant's cost of borrowing]." *U.S. v. Allegheny Ludlum Corp.*, 366 F.3d 164, 181 (3d Cir. 2004) (holding that

2 The U.S. claims that "the Court found that a 10% rate was the appropriate one to use for valuing the delayed and avoided costs over time." Gov. Br. at p. 13. This is based on a comment by the Court – not a finding – made during direct examination of Harris, before Harris' testimony was complete or CITGO's economist testified.

government's calculation of WACC using yields on Standard & Poor bonds instead of the defendant's bonds was improper). This Court should reject Harris' calculations using a 10% rate and, instead, rely on CITGO's calculations using its actual cost of capital.

C. CITGO presented evidence of several least-cost scenarios from which economic benefit can be reasonably approximated.

The following table summarizes the evidence showing options for arriving at the least-cost means of avoiding the spill. *See* D-1851 (summarizing the scenarios) and D-1796 (Finch expert report, calculations at Tab F), Tr. Trans at 2716:11-2717:4; 2717:13-2718:4; 2719:4-18.

LEAST-COST OPTIONS	**ASSUMPTIONS**	**ECONOMIC BENEFIT (Using CITGO's cost of debt to compute present value)**
Tischler Least Cost Scenario (D-1846)	CITGO removes oil from tanks and seals junction box by 2005	$719
Tischler Scenario (D-1847)	CITGO builds third tank and upgrades existing aeration tanks by 2005	$940,038
Modified Amendola Scenario (D-1848)	CITGO accepts Amendola's assumptions, except for fourth tank, and third tank and aeration tank upgrades made in 2005 rather than 1994[3]	$7.2 million

The evidence showed that each of the above alternatives would have prevented a spill to waterways. Even accepting all of Amendola's proposals – which is contrary to the least-cost-alternative rule because the U.S. failed to prove they were required to prevent the spill – but applying the proper discount rate, the economic benefit comes to at most $14.7 million. D-1849.[4]

3 Accepted capital cost assumptions are: one caustic neutralization units(1994); two API separators (1994 and 2005); dissolved gas flotation unit (1994); and upgrade aeration tanks fine bubble diffusers (2000).

4 CITGO also presented alternative calculations using the CWA's five-year limitations period. D-1851. These values ranged from $719 – $20,116,640. D-1851. The highest figure in that range accepts all of the U.S.'s assumptions and its 10% discount rate and, thus, is not a least cost alternative calculation. Even so, however, for the reasons discussed in this brief, the Court's adoption of any of these calculations, including the highest figures would support the Court's $6 million penalty.

Using the appropriate discount rate – CITGO's actual cost of capital rather than the cost of capital of publicly traded companies – all of the above least-cost, economic-benefit calculations are near or below this Court's $6 million penalty. And those calculations do not take into account other mitigating factors, including CITGO's out-of-pocket expenses resulting from the spill.

D. The Court has discretion to offset or at least consider the economic detriment resulting from the spill.

The Court has discretion to offset CITGO's costs resulting from the spill from any cost-savings benefit. As Finch testified, a correct economic benefit analysis includes consideration of the costs as well as the gains. Tr. Trans. at 2721:18-2722:1. The U.S.'s economic-benefit expert, Harris, testified that he had included an offset for economic detriment in another CWA case in which he testified on behalf of the government. Tr. Trans. at 1283:23-1284:3. Harris provided no economic reason for doing something different here.

The evidence showed that CITGO incurred more than $136 million in expenses relating to the spill, including $65 million in response and clean-up costs, a $13 million criminal penalty, and legal settlements and expenses. D-1855. While insurance reimbursed CITGO for a substantial portion of its expenses, over $34 million of costs were unreimbursed by insurance, having an economic value of approximately $29 million after tax effects and other adjustments. D-1853. This is in addition to $1.9 million of unrecovered oil that was not covered by insurance. Tr. Trans. at 2740:8-19. Moreover, CITGO's insurance costs increased substantially after this insurance claim. D-1854; Tr. Trans. at 2741:10-2741:11.

In addition, CITGO spent $7 million to comply with an Environmental Compliance Plan required by the same government agency that brought this civil enforcement action D-136 at p. 1-2; D-1022**,** completed construction of the $15 million storage tank that was nearly complete

when the spill occurred and is also complying with this Court's order to make substantial upgrades to the WWTU. The U.S. estimated that the injunctive relief would cost $30 million. Tr. Trans. (Gary Amendola), 1438:5-13. CITGO will compensate for any damage to natural resources through a separate regulatory process, and it paid a $3 million fine in this case to the State of Louisiana, which neither the State nor CITGO appealed.

The U.S. disputed none of CITGO's cost calculations. In short, CITGO's costs outweighed any gains resulting from spill, providing a strong incentive – without further penalty – to prevent a spill from reoccurring. Whether this Court chooses to subtract CITGO's costs from the benefit – or considers the costs in the total mix of evidence under the penalty factors – there is no basis for substantially increasing the Court's penalty as urged by the U.S.

E. Conclusion: Economic Benefit

As discussed above, the U.S.'s calculations of economic benefit should be rejected for their failure to comply with the legal standard. Only CITGO presented evidence of the least-cost means of preventing the spill and provided several alternative ways to properly calculate economic benefit, ranging from $719 to $14.7 million. CITGO suggests that the scenario adopting some of the U.S's proposals – but not requiring the third tank until 2005 – is a reasonable approximation of the least-cost means of preventing the spill and comes to $7.2 million. And when CITGO's out-of-pocket costs are taken into account – whether dollar for dollar or considered in the context of all the evidence – the Court's $6 million penalty or a modestly increased penalty is well supported by the record.

II. As This Court Originally Found, CITGO Was Not Grossly Negligent.

As this Court explained in its Judgment, "[u]nder Louisiana law, gross negligence is willful, wanton, and reckless conduct that falls between intent to do wrong and ordinary negligence." *U.S. v. CITGO Petroleum Corp.*, No. 08-897, 2011 WL 10723934 (W.D. La. Sept.

29, 2011) (citing *Houston Exploration Co. v. Halliburton Energy Services, Inc.*, 269 F.3d. 528 (5th Cir. 2001). "Gross negligence is substantially higher in magnitude than regular negligence." *Id.* The Fifth Circuit agreed, holding that this Court "applied the correct legal standard" in its analysis of the government's gross negligence claim. *U.S. ex rel. Administrator of E.P.A. v. CITGO Petroleum Corp.*, 723 F.3d 547, 555 (5th Cir. 2013). Accordingly, this Court viewed the facts of this case through the proper legal framework when it reached its conclusion that CITGO was not grossly negligent.

A. CITGO designed and built a state-of-the-art waste water treatment unit with sufficient storage capacity to meet its conservative design standard.

CITGO built a state-of-the-art waste water treatment unit in 1994, which this Court found was adequate, not under built or deficient as the U.S. continues to claim despite this Court's prior finding. Judgment at p. 2; Tr. Trans. at 1856:2-15. The government's engineering expert, Mr. Amendola, agreed that the 24-hour/25-year design standard for the WWTU was "conservative" and "reasonable for the site-specific circumstances at the CITGO refinery." Tr. Trans. at 1517:15-19. ("Q. You agree that the 24-hour/25-year design standard is a conservative standard? A. Yeah, it is conservative, and I would consider it reasonable for the site-specific circumstances at the CITGO refinery."). He also acknowledged that no regulation required CITGO to design for that conservative standard and that the median design standard for U.S. refineries was for a 10-year storm event, not a 25-year storm event. Tr. Trans. at 1517:20-23; 1517:24-1518:6; D-1105 at p. 8.

The government accuses CITGO of removing waste water storage capacity from the WWTU design to save money. Gov. Br. at p. 29. In fact, CITGO installed more waste water storage than its own consultant recommended when it built the WWTU in 1994. The study on which the 1994 WWTU construction design was based advised CITGO that it needed 20.4

million gallons of tank volume for waste water storage to accommodate a 25-year storm. Tr. Trans. at 1701:11-22; P-417 at p. CIT0090875. Yet CITGO actually installed 25.4 million gallons of tank volume. Tr. Trans. at 1701:23-1702:1. CITGO did not under-design or under-build the WWTU in 1994.

The government focuses myopically on storage capacity in its brief while ignoring that the volume of water needed to be treated and stored is equally if not more important. The U.S. mischaracterizes the record by claiming CITGO reduced capacity in the design against the recommendations of outside consultants. Rather, CITGO and its consultants designed the WWTU to create several locations where storm water could be discharged directly to the river in compliance with its permits. This reduced the projected volume of water that would go to the WWTU and reduced the volume of required tank storage, consistent with sound engineering practice. Tr. Trans. at 1847:25-1849:25; 1850:12-21; 1856:2-15 (testimony of Jerry Dunn) ("If the Court has been shown by the plaintiffs a document saying that the waste water treatment plant was intentionally limited in capability, do you have an understanding of what that means? A. My impression of what they mean is what we're just talking about, that we set up a design based on the implemented source control. Q. So rather than having an overbuilt waste water treatment system, you went back to the source to try to control it before it got there? A. Yes. Q. Is that state of the art? A. In my opinion it is. It's a practical, more-efficient design."). The U.S. ignores these facts entirely in contending that CITGO under built the WWTU.

Far from hoarding money it should have spent on its facilities, CITGO spent hundreds of millions of dollars on zero-return maintenance and regulatory projects (which CITGO classifies as "must do," not discretionary) throughout the period at issue. Tr. Trans. at 1274:22-1275:1. The WWTU itself was a zero-return project that cost nearly $150 million. D-39. And CITGO

paid no dividends to its parent in 1994-96, the years when the U.S. claims that CITGO intentionally diverted funds from the WWTU. Tr. Trans. at 2710:21-2712:1. In 2003, when it was about to begin building the third storm water tank on the recommendation of outside consultants, CITGO spent three times as much on regulatory and maintenance projects than on strategic projects that could potentially yield a return on investment, $308 million to $106 million. D-265 at p. 28; Tr. Trans. at 1275:22-1276:11.

B. CITGO's operation of the WWTU was not grossly negligent.

Only in the U.S.'s one-sided view of the record could CITGO's conduct after the WWTU began operating be found to constitute gross negligence or willful misconduct. While the WWTU experienced operational issues during its early years and reported permit exceedances during 1994 through 1996 (though none were reported between 1996 and 1999), even the U.S.'s engineering expert conceded that this was not unusual for a new facility. Tr. Trans. at 1490:22-1491:10.

The U.S. incorrectly contends that, in 1996-1998, CITGO failed to act on requests and recommendations of employees and consultants to add more tank capacity. Gov. Br. at p. 32. The U.S. points to a request in 1996 by a WWTU supervisor to build an additional tank; however, capital improvements must go through a process, including studies, before they are approved for funding. Dep. of Kresha Sivinski at 23:3-25:17 **(**Rec. Doc. 192, USA's Deposition Designations, at Ex. S). A CITGO memo routing the WWTU's supervisor's request for further study shows that this request was not ignored and went through those channels. D-1084, Memo from Charles Shumate to David Booth, 11/7/96 ("Your assistance is requested in addressing the recently identified storm water capacity issue. . . we should initiate a new project to develop and evaluate options which provide storm water relief . . . A DCA has been initiated and is being

routed through normal channels.")(attaching copy of Schweitzer Request for Design Change Authorization cited by government). CITGO then hired an outside engineering consultant, ENSR, to evaluate CITGO's storm water capacity. Tr. Trans. at 1809:8-11 (Testimony of Citgo's waste water treatment expert, Lial Tischler)("Q. Is this document showing that CITGO, after the recommendation from Mr. Schweitzer, kicked off a project that led to the 1998 hydrology study? A. That's what this interoffice letter indicates.")

Critically – and contrary to the U.S. claims – ENSR's 1998 study did not recommend a new storm water tank. D-1046 at p. CIT0200535-36 (ENSR study executive summary). ENSR concluded that CITGO needed 23.19 million gallons of tank capacity, less than what CITGO had initially installed when it built its waste water plant in 1994. Tr. Trans. at 1702:17-1703:1; D-1046 at CIT0200541. In discussing the option of a third tank, ENSR said that "construction of additional storm water tankage is not the only possible solution to the problem" and is "not the most cost effective means of improving storm water handling." D-1046 at p. CIT0200539; CIT0200542.[5]

ENSR made three key recommendations for modifications to the WWTU, which included: modify procedures for sludge management; reduce wet weather flow rates at waste water treatment by containing storm water within a bermed landfarm area and redirecting clean storm water to the Indian Marais; and reduce dry weather flow rates by reducing cooling tower blowdown requirements. D-1046 at CIT0200535-36 (Executive Summary). CITGO implemented these recommendations. D-43 at p. CIT0261291. In addition, to ensure adequate emergency capacity for its waste water treatment facilities, CITGO paved the containment area

5 ENSR's conclusion that a third tank was not the most cost-effective solution to storm water handling in 1998 demonstrates further that the government's economic benefit calculations, which assume a third tank was required no later than 1994 or 1996, are improper.

surrounding the storage tanks. Tr. Trans. at 2464:11-13. The paved dike provided an additional 11 million gallons of secondary containment capacity, the equivalent of a storm water storage tank, for use "[i]n a severe storm event" to keep untreated water on the refinery's property in case of an emergency overflow. D-43 at p. CIT0261295.

Along with the other WWTU upgrades CITGO had already accomplished, including reducing total water flow to the WWTU during rain events by "discontinuing cooling water blowdowns, temporary holdup of tank dike and land farm drainage," and increasing storm water treating equipment availability "by eliminating sludge accumulation in the storm tanks," CITGO concluded that paving the containment area would "permit [it] to handle a major rainfall event without jeopardizing the safety of personnel or facilities, permit operations within the environmental regulations and permits, and provide options for CITGO to stop using the surge ponds during heavy rain events." D-43 at CIT0261291; CIT0261293. Even Mr. Amendola, the government's expert on waste water facilities, agreed that paving the dike was a reasonable way to address storm water capacity issues and that it was "not reckless to have an emergency discharge to a dike area that can be reworked back through the treatment system." Tr. Trans. at 1495:25-1496:10.

The government argues that CITGO rejected ENSR's recommendation to build an additional tank in 1998, citing the testimony of Diana LeBlanc. *See* Gov. Br. at p. 32. But LeBlanc was simply mistaken in her recollection that ENSR had made that recommendation, as the ENSR study itself plainly shows. There is no question that ENSR evaluated a third tank option – and discusses it in the study – but ENSR's recommendations did not include a third tank in 1998.

Contrary to the government's arguments (*See* Gov. Br. at p. 35), CITGO had adequate waste water storage and never used the diked containment area as primary containment. The AFE authorizing funding for the project specified that the "diked area surrounding the Stormwater Tanks" would be used "to hold emergency discharges of excess stormwater in the event of a rainfall greater than design or if mechanical problems arise or a combination of both happens at the same time." D-43 at CIT-0261293.[6] After implementing the ENSR-recommended improvements and paving the containment area, CITGO did have adequate capacity: there were no further storm water diversions at the waste water treatment unit after 1998 through the date of the spill. Tr. Trans. at 1810:12-16; 1812:1-3.

CITGO hired ENSR to do another storm water study in 2002 because of a planned refinery expansion. After completing this study, ENSR, for the first time, recommended that CITGO add a third storm water tank so that it would have sufficient capacity to handle increased flows resulting from the new crude processing unit. D-44 at p. CIT0259709 ("This study is intended to aid in planning for the impacts that these changes [to the refinery] will have on the waste water collection and treatment systems."). ENSR's conclusions were based on the projected future flows from the expansion, not on conditions at the time of the study. Tr. Trans. 2541:10-18. Accordingly, it was not until the refinery expansion was brought on-line, in 2005, that a third tank was needed. Tr. Trans. at 1780:9-17 (Lial Tischler testimony) ("Q. Did you specify a time period when you believed the third tank should have been built? A. Yes, I did. Q. And when was that? A. I said it should have been built in 2005 before -- THE WITNESS: And the third tank, Your Honor, we're talking about Tank 340, the third storm water tank. A. I

6 There is a statement in a document attached to the AFE for the paving of the containment area that incorrectly states that ENSR had recommended a third storm water tank. D-43 at CIT0261306. But this is contrary to what ENSR's study concluded as discussed above and to the summary of ENSR's study contained in the project description section of the AFE. D-43 at CIT0261291.

believe that that should have been constructed before they brought the crude unit online which was in 2005."). The refinery requested funding and received authorization to begin the project in 2004. D-46 (March 26, 2004 AFE); Tr. Trans. 2541:25-2543:5. Construction of the third tank began in 2005 but was delayed by scheduling miscalculations and contractor problems. Tr. Trans. at 1887:10-1888:2. CITGO tried to address these problems by working overtime and changing contractors. Tr. Trans. at 1888:15-1889:4. While the third tank should have been completed in 2005, before the June 2006 spill, it was not delayed by ten or twelve years, as the government contends. *See* Gov. Br. at p. 31.[7]

C. CITGO had adequate capacity to contain the spill.

On the day of the spill, a heavy rainfall struck Lake Charles. Tr. Trans. at 1468:25-1469:2; D-820 at p. USCG040803. Total rainfall calculations for that day ranged from 8.3 inches to the Coast Guard's estimate of 11 inches.[8] Judgment at p. 3; D-820 at p. USCG040803. This massive rainfall – which for three hours was a 1 in 50 year event - overwhelmed CITGO's WWTU, causing water and oil contained in the two operating storm water tanks to overflow into the surrounding containment area or dike. D-318 at p. CIT0000282; Tr. Trans. at 1817:2-11; 2440:7-13. Because CITGO was in the process of building the third storm water storage tank, a portion of the containment area's concrete floor had been temporarily removed to allow for

7 The government also states that this Court determined that four tanks were needed to prevent the oil spill. Gov. Br. at p. 31. This also is not true; while the Court ordered a fourth tank built as part of its injunctive relief, it made no determination that a fourth tank's storage capacity was necessary to prevent the June 2006 spill from happening. The fourth tank alone accounts for $40 million of the government's estimated economic benefit. See U.S. Remand Ex. B, page 1 of 36.

8 The government insists that 8.3 inches of rain fell in Lake Charles on the day of the spill rather than 11 inches. Gov. Br. at p. 36. The exact amount of rainfall (either is a large amount) should make no difference in the Court's penalty evaluation and, whether 8.3 or 11 inches of rain fell, no oil would have escaped CITGO property if not for the leaky junction box.

installation of an underground junction box to re-route drainage. Tr. Trans at 1471:7-24; 1871:10-12; D-820 at USCG040803.

It was not until the day after the rainfall that responders noticed a swirling motion inside the containment area, which led to the discovery that water and oil had penetrated the temporary earthen floor into a junction box. This underground box housed pipes leading to a drainage ditch that flowed to the Indian Marais. Tr. Trans. at 1969:14-1970:11;1868:15-22; 2453:8-12; 2619:2-16. Virtually all of the oil that ultimately escaped to the Indian Marais (54,000 barrels) and Calcasieu River (25,000 barrels) exited through the junction box. Tr. Trans. at 2620:4-8; 1815:9-21; 1868:11-22; 1872:10-19; 2612:8-2617:4.

Had it not been for the construction project to build the third tank, CITGO's containment area would have been sufficient to serve its purpose as secondary containment and held the oil on CITGO's property.[9] The government presented no evidence to quantify the amount of oil that escaped through any means other than the underground junction box. CITGO's chemical engineering expert, Dr. Russ Ogle, quantified the amounts of oil that could have escaped the containment area through all potential pathways, and concluded that "of all the hypotheses, I ruled them all out except for one, and that was the junction box." Tr. Trans. at 2612:8-20. No other expert did this analysis, and there is no credible evidence that any quantifiable amount of oil escaped through any other means. The oil escaped from CITGO property not because of

9 The government argues that CITGO's belief that its dike containment area could have contained the spill was "unreasonable," and argues instead that the containment berm was "like a sieve," quoting a comment from this Court during trial: "that oil got out [of the berm] every way, shape, form and style." Gov. Br. at p. 35. Notwithstanding that statements made by counsel or the Court are not evidence, and that this statement came early in the trial before any evidence had been provided on the fate and transport of the spill, the government relied on this statement to the Fifth Circuit as the only evidence in support of alternate means of the oil escape. Gov. Fifth Circuit Br. at p. 11. That the government would still rely on this statement – even though the only credible evidence presented at trial showed that the oil escaped through the junction box – is troubling and highlights the U.S.'s refusal to recognize the voluminous evidence presented at trial that supported this Court's judgment.

insufficient capacity, but because the concrete containment area had been disturbed and the unsealed junction box had been installed as part of building the third storage tank. Tr. Trans. at 1815:12-21 (Lial Tischler) ("Q. And if it wasn't for the junction box, it wouldn't have mattered how much oil was in the containment area that day; is that right? A. Yes. They could have basically collected all the oil and held it and removed it had there not been a leak in the junction box. Q. And the junction box wouldn't have been an available pathway if CITGO wasn't in the process of trying to do the right thing and build a third tank? A. That's accurate.").[10]

D. CITGO did not knowingly allow oil to collect in the tanks.

The evidence showed that no one at CITGO knew the amount of oil in the tanks. Tr. Trans. 1877:11-1878:18. The WWTU supervisor at the time testified that, based on his knowledge of how the unit operated, he did not believe that the tanks had accumulated large amounts of oil.[11] CITGO was aware of the tanks' high levels in the months leading up to the spill; however, it believed that this was due to solids, and it had a plan in place to begin removing them within weeks of the spill. *See* Judgment at p. 3. ("However, testimony shows that Citgo was working on a plan to remove the excess shortly before the spill.")

While the U.S. contends that the cost of installing new pumps to make the oil skimmers operational was minimal – $18,000 – and that this shows CITGO's conduct was egregious, in

10 The government may argue that the total amount of materials that overflowed from the tank exceeded the storage volume of the containment area, and so CITGO lacked capacity to contain the spill. The government only makes this argument by conflating oil with water. The oil would have been contained if not for the junction box. CITGO had the ability to use – and did use – drainage valves in the containment area to drain water below the floating oil to prevent oil from overflowing the berm. Tr. Trans. at 1475:1-1476:4.

11 Curtis Miller Dep. at 149:10-18 ("I didn't think I had that much oil in the tanks because of what my experience had been from day one getting in there and, you know, looking at the tanks levels and what I contribute to be dirt, sand, you know, and some oil. It's not, you know, because of the way the system is by no way I thought it was that much oil in there."). Miller believed he was removing oil each time he pumped liquids from the tanks after a rainfall. *See id*. at 192:18-193:5 ("[E]ach time that tank goes up and I have to pump when I'm pumping storm into 310 I'm pulling oil and water and everything and anything coming through there that's fluid.").

fact, the opposite is true. If CITGO had known that millions of dollars worth of oil had accumulated in the tanks, it would have made no sense to refrain from spending a small fraction of that amount to remove it. The minimal cost of resuming oil skimming operations is further evidence that CITGO acted negligently, not that it acted with bad intent.

The U.S. also incorrectly paints CITGO as having had knowledge of the risk that oil would spill to the waterways. Because it did not know that significant quantities of oil had accumulated – or that there was an underground pathway to the waterways if materials overflowed to the secondary containment area – CITGO believed, at worst, the high tank levels posed a risk of waste water spilling to the containment area on CITGO's property. That risk would not have involved a Clean Water Act violation and would have been of an entirely different character from an oil spill to waterways.

E. CITGO's operational exceedances had nothing to do with the oil spill and do not support the government's gross negligence case.

CITGO's permit exceedances are not evidence that CITGO was "gambling with the environment" and grossly negligent. First, the LPDES permit exceedances at the CITGO refinery had nothing to do with the 2006 oil release, which resulted from an overflow of the tanks and subsequent loss of containment.[12] Tr. Trans. at 1706:21-1707:6. The government conceded at trial that no government agency ever cited CITGO with any kind of enforcement action for having inadequate storm water storage capacity. Tr. Trans. at 1494:7-9. In fact, before the 2006 spill, the storm water storage tanks at the WWTU ***had never overflowed***. Tr. Trans. 1812:1-3; 2440:11-17; D-1837.

12 The United States brought its claims against CITGO for the 2006 oil spill; it never brought a claim against CITGO for violations of its LPDES permits, which were the subjects of the exceedances. See Complaint, 6/24/2008 at ¶ 1, ¶ 28-40.

The government leans heavily on its contention that CITGO had 950 days of discharge violations from the WWTU. Gov. Br. at p. 41. To put that number in context, however, it is a calculation based on periodic sampling results that assumes an exceedance occurred every day for a month. There is no actual evidence that CITGO was in violation of permits for a total of 950 days. Tr. Trans. at 1796:1-23.

The government also now argues for the first time that CITGO operated in violation of its CWA operating permit every day for at least five years, or 1,825 days preceding the spill. This assertion is incorrect and unsupported by any evidence. The U.S. bases its 1,825-day figure on this Court's penalty determination in favor of the State of Louisiana in which it found that CITGO failed to maintain and operate its waste water treatment facility for five years prior to the spill. Judgment at p. 17. The Court made no finding, however, that CITGO was in violation of its permits for five years. Moreover, CITGO has already been penalized by this Court with a $3 million fine for failure to operate the WWTU properly for five years. To enhance the U.S. penalty on this basis would unfairly punish CITGO twice for the same conduct. It would also be inequitable and inconsistent with the concurrent jurisdiction shared by the U.S. and the State under the CWA.

Finally, the government ignores the evidence that CITGO complied with its permits more than 99% of the time between 1994 through 2009. Tr. Trans. at 1693:12-1694:1.

In sum, the evidence – when viewed in context – supports the Court's original finding that CITGO was not grossly negligent.

III. <u>This Court Properly Considered The Other Penalty Factors As Mitigating Factors.</u>

The Fifth Circuit found no clear error in this Court's assessment of the remaining penalty factors, which strongly support this Court's original penalty.

Clean Water Act ("CWA") case law supports awards that are a smaller fraction of a potential maximum penalty than what the Court awarded here, which exceeds 10% of the potential maximum. For example, in *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 576 (5th Cir. 1996), the Fifth Circuit upheld a district court's penalty award of $186,070 under 33 U.S.C. § 1319, though the potential maximum penalty under the statute was $20,225,000. Despite finding that the violation was "moderately serious;" that the defendant had continuously violated the CWA since it began operating the well at issue; and, that it had not demonstrated good faith in attempting to comply with the CWA, the district court imposed a penalty of less than one percent of the statutory maximum. *See also United States v. Marine Shale Processors*, 81 F.3d 1329, 1336 (5th Cir. 1996) (approving CWA civil penalty that was 7% of the statutory maximum, even though the violations at issue were, in the words of the district court, "willful and flagrant" and the respondent had shown "callous disregard for the regulatory scheme and the purposes of the Clean Water Act"). Courts from other circuits have likewise upheld civil-penalty awards constituting a small (even infinitesimal in one case—0.002%) fraction of the CWA's maximum penalties.[13] And, in the *only* other reported case assessing civil penalties under the OPA amendments to the CWA, the district court refused to calculate a per-day penalty, which would have yielded a maximum penalty of $3,475,000, an amount the Court thought was inappropriately high. Instead, the district court assessed a $100,000 penalty that represented just

13 On a percentage-of-maximum-penalty basis, the award in this case is more severe than most reported decisions rendered under the CWA—particularly if the cost of injunctive relief, which is significant, is taken into account. Other courts have issued or affirmed penalties of 7.2% of the statutory maximum, *see United States v. Smithfield Foods, Inc*., 191 F. 3d 516, 529 (4th Cir. 1999); 29% of the statutory maximum, *United States v. Allegheny Ludlum Corp*., 366 F.3d 164, 178 n.6 (3d Cir. 2004); 10% of the statutory maximum, United *States v. Ciampitti*, 669 F. Supp. 684, 699-700 (D.N.J. 1987); 9% of the statutory maximum, *U.S. v. Mun. Auth. of Union Twp*. 150 F.3d 259, 265 (3d Cir. 1998) and *Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York*, 244 F. Supp. 2d 41, 54 (N.D.N.Y. 2003), vacated and remanded on other grounds, 451 F.3d 77 (2d Cir. 2006); 0.002% of the statutory maximum, *Haw.'s Thousand Friends v. City of Honolulu*, 821 F. Supp. 1368, 1395-96 (D. Haw. 1993).

3% of the potential maximum penalty under a per-day calculation. *See U.S. v. Egan Marine Corp.*, No. 08-3160, 2011 WL 81443393 (N.D. Ill. Oct. 13, 2011). Not one of these cases has suggested that a district court must be bound to award a civil penalty equal or, even close, to the maximum allowed under the CWA.

A. Efforts to Mitigate

This Court properly considered CITGO's efforts to minimize or mitigate the spill's effects as a reason for imposing a lower penalty. The Fifth Circuit concluded that it did "not discern any clear error in the facts found here or abuse of discretion in weighing this factor as [this Court] did." *Id.* In fact, Congress directed courts to weigh this penalty factor heavily: "[i]n determining the amount of a civil penalty, particular weight should be given to the rapidity and effectiveness of the response actions by the responsible party." *In re: Oil Spill by the Oil Rig DEEPWATER HORIZON in Gulf of Mexico, on April 20, 2010*, 844 F. Supp. 2d 746 (E.D. La. 2012) (quoting H. R. Rep. No. 101-653, at 52 (1990) (Conf. Rep.), reprinted in 1990 U.S.C.C.A.N. 779, 833). Despite this Court's finding – and the Fifth Circuit's affirmance – the U.S. seeks to retry this aspect of the case with the same arguments that this Court considered before. There is no reason for the Court to revisit its original evaluation of this factor, and the evidence overwhelmingly supports a lower penalty.

As this Court found, CITGO made a "full force effort to minimize the damage from the spill." Judgment at p. 7. Once CITGO discovered there had been a large spill to waterways, it quickly mobilized and spent nearly $65 million in response and clean-up efforts. Tr. 2730:9-21; 2734:9-25; D-1855. The Coast Guard applauded the "rapid CITGO ramp up," and commended its construction of an underflow dam in the Indian Marais that "allowed large quantities of oil to be recovered." D-820 at pp. USCG040805, 40813.

CITGO hired two of the largest and most-respected oil-spill clean-up companies in the nation, NRC and MSRC. Tr. Trans. at 633:3-13; 1617:6-13; 1625:13-20; D-820 at p. USCG040805. At the height of its response, CITGO had deployed 1,500 people, over 320,000 feet (60 miles) of hard boom, many more miles of sorbent boom, 68 vacuum trucks, 33 skimmers, 82 boats, and additional clean-up equipment it commissioned from around the United States and even international locations. D-820 at p. USCG040799-800; Judgment at pp. 7-8.

While the government criticizes CITGO's initial response as inadequate, its own witness, Coast Guard Commander Kenneth Mills, who led a specialized unit dedicated to emergency spill response, testified that, when he arrived onsite at first light on June 21, he was impressed with CITGO's prompt and proactive response plan and its hiring of oil spill response contractors. Tr. Trans. at 633:20-25. He had never seen a spill response that deployed more resources and praised CITGO for sparing no expense, which was atypical in his experience. Tr. Trans. at 635:1-24.

And CITGO's response *was* successful. CITGO completed active clean-up of the waterways affected by the release within a month. Tr. Trans. at 1646:9-23. The LDEQ and Coast Guard inspected miles of shoreline downstream from CITGO and concluded by July 2006 that their pre-established "response cleanup endpoints" had been met in nearly all locations and, by the end of 2006, they stated that no further clean-up was needed in any area. Tr. Trans. at 1639:3-1630:3; 1646:9-1647:6; Judgment at p. 8. The Intracoastal Waterway was reopened to commercial traffic ten days after the spill, and the Calcasieu River was reopened for all uses in approximately three weeks. Tr. Trans. at 73:2-16.

The government criticizes CITGO's notifications to the authorities as untimely and incomplete. But CITGO reported what it knew, when it knew it, and the government's own

expert witness conceded at trial that CITGO's notifications were satisfactory. At around 8 a.m. on the morning of June 19, when a CITGO contractor observed sheen in the Indian Marais and later that morning in the Calcasieu River, CITGO notified the National Response Center, the Coast Guard, LDEQ, and other agencies. D-305; Tr. Trans. at 2446:20-22; D-800 at p. EPA_6R002620; D-801 at p. EPA_6R002594; D-810 at p. EPA_6R002605; D-798. With a second call at 11:37 a.m., CITGO notified the Coast Guard that the "[o]il sheen has gotten worse. Booms are being deployed. We're at level 2." Tr. Trans. at 781:11-24; D-802; D-798.

The government's oil spill response expert, Richard Franklin, conceded that CITGO's 11:37 a.m. notification was sufficient to have prompted further inquiry from the Coast Guard and, in fact, did so for the LDEQ. Tr. Trans. at 782:10-23; 795:3-20; 647:14-648:9. Indeed, the Coast Guard responded to the call but, as Plaintiff's attorney stipulated at trial, the Coast Guard mistakenly went to another refinery instead of CITGO. Tr. Trans. at 647:14-648:9; 797:7-10.

The government still complains that CITGO did not provide more complete updates and claims that oil was "pouring into the Indian Marais" on day one of the spill. Gov. Br. at p. 53. But the evidence does not support this account, either. CITGO employees saw sheen and sporadic two-foot black ribbons but did not know where the oil was coming from or if it came from CITGO's refinery or a neighboring plant. Tr. Trans. at 280:1-282:18; 435:2-12; 437:14-438:14; 495:6-12; 496:5-499:9; D-301("All he saw whole day was water outside dike area"); D-303 ("Did not see oil in Marais" at 9:00 a.m.). At the time, all the material overflowing the tanks appeared to be contained in the dike. Tr. Trans. 495:6-12; 508:1-25; 781:6-10; 2444:9-2445:7; D-301. Nonetheless, CITGO searched for the source of what appeared to be a small release, and began to deploy boom to prevent any oil from getting to the river. Tr. Trans. 438:2-14; 443:12-25; 495:6-498:21.

In contrast to the Coast Guard, the LDEQ responded to CITGO's June 19 notification by sending an employee to CITGO's facility that afternoon, where, consistent with CITGO's account, he observed that the WWTU's storage tanks had overflowed to secondary containment and that "light hydrocarbons" had reached the Indian Marais. Tr. Trans. 793:6-794:8; D-318 at p. CIT0000305. LDEQ also noted that CITGO had deployed booms and hired an outside response company to control the spill. Tr. Trans. 793:6-794:8; D-318 at p. CIT0000305.

By the afternoon of June 19, oil had begun to accumulate in the drainage ditch bordering the west side of the WWTU, although still no one knew its source. Tr. Trans. 2448:20-2449:25; 508:1-25. CITGO built a dam using soil and plywood in front of the culvert connecting the west ditch to the Indian Marais. Tr. Trans. at 455:5-19; 511:4-513:17; D-689. At the end of the day, CITGO believed that only a small amount of oil had escaped the secondary containment area, the authorities had been properly notified, and that the containment area was secure. Tr. Trans. at 508:1-25; 513:13-514:1; 2476:6-24.

CITGO did not leave the dam unattended overnight. *See* Gov. Br. at p. 53. Rather, as the government's expert confirmed, responders worked overnight vacuuming oil out of the ditch and containment area. Tr. Trans. 923:8-13; 1870:8-20. Nonetheless, the dam failed, and oil began leaking to the Marais and river, though the magnitude of the release was not discovered until daylight. It was not until mid-morning on June 20 that responders discovered a leak in the containment area.

All of these facts support a lower penalty. The government argues that the scope of CITGO's mitigation and clean-up efforts should be considered aggravating rather than mitigating because CITGO had a duty to clean up the spill and did not, at the very beginning, adequately respond to the spill and notify the authorities. Gov. Br. at p. 51. This Court found, however, that

"measures were taken by CITGO to minimize and mitigate the effects of the discharge promptly" and that while "the damage could have been much worse," the environment has made a good recovery as a "result of the well executed clean-up effort." Judgment at p. 4. It also took note that, as of the trial, CITGO had made efforts to improve its operations and prevent future spills, had complied with its Environmental Compliance Plan, and had implemented "further improvements including raising dike walls and sewer improvement." Judgment at p. 4. The Fifth Circuit did "not discern any clear error in the facts found here or abuse of discretion in weighing this factor as the district court did." 723 F.3d at 553. The evidence on "efforts to mitigate" supports the penalty imposed by the Court.

B. Seriousness of the Harm

This Court also properly considered the seriousness of the harm, and the Fifth Circuit did not direct it to reconsider its findings on this penalty factor. *See U.S. ex rel. Administrator of EPA v. CITGO Petroleum Corp.*, 723 F.3d 547, 553 (5th Cir. 2013). As this Court ruled, "the testimony showed that the environmental impact was almost fully rectified by 2009, the wildlife seems to be showing no adverse impacts from the spill" and the spill "did not result in irreparable harm to the environment." Judgment at pp. 4, 7. Dr. Michel, plaintiff's oil spill expert, conceded that the government had no evidence of any "chronic or long-term toxicity for the CITGO oil spill." Tr. Trans. at 329:17-19. Dr. Slocomb, an environmental scientist who, unlike Dr. Michel, participated directly in the environmental assessment of the spill and made over 100 post-spill trips to the Calcasieu estuary to monitor its recovery, testified about the short-term and relatively minimal effects of the spill. Tr. Trans. 313:3-6 (Dr. Michel); 2028:11-17 (Dr. Slocomb); 2031:18-2032:17 (Dr. Slocomb). CWA case law shows that little "material environmental harm" is a significant mitigating factor. *See Catskill Mountains Chapter of Trout*

Unltd., Inc. v. City of New York, 244 F. Supp. 2d 41, 50 (N.D.N.Y. 2003), *vacated and remanded on other grounds*, 451 F.3d 77 (2d Cir. 2006); *accord Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F. Sup. 1368, 1395-96 (D. Haw. 1993) (absence of "evidence that [the violation] currently poses a threat to public health or the environment" is a "significant mitigating factor in assessing penalties.").

The government ignores this case law and instead urges the Court to reconsider the seriousness of the violation, relying heavily on the volume of the spill and amount of affected shoreline, but ignoring the overwhelming evidence that the spill did not cause long-lasting harm to the environment. Gov. Br. at p. 43. Indeed, clean-up of the heaviest oiled areas was finished by July 2006, less than a month after the spill. Tr. Trans. at 1636:16-1638:2; 1672:23-1673:4.

While marsh shorelines were the areas most adversely impacted by the spill, joint studies by CITGO and government agencies showed that only 118 acres of marsh – a small fraction of the estuary's total shoreline – were impacted and, of that, only ***half*** had any sediment oiling at all. Tr. Trans. 2038:1-9; 2039:3-2040:10; D-1838. While the government attests that "marsh plants were coated in oil and died," Gov. Br. at p. 45, less than six of the impacted acres were heavily oiled. Tr. Trans. 2040:5-23; D-1838. Moreover, Dr. Michel admitted at trial that her evidence that marsh plants had died – the yellowing of plants – does not actually mean that the plant has died. Nor could she recall how much of the marsh grass had yellowed at trial. Tr. Trans. at 334:14-16; 334:21-335:10. More than half of the affected marsh – that is, the half that had any oiling at all - had completely recovered within three months of the spill by September 2006 and more than ninety percent had fully recovered by October 2008. Tr. Trans. at 2041:21-2042:16.

Dr. Slocomb also testified, and Dr. Michel agreed, that scientific testing showed that the oil did not cause toxic, or lethal, effects on sediment organisms or bivalves such as oysters.[14] Tr. Trans. 359:4-11 (Dr. Michel); 2061:5-2063:21; 2066:6-8; 2067:19-22; 2086:1-23. Although the government refers to "[n]umerous eye witness accounts" of fish kills, Gov. Br. at p. 45, its own expert admitted that it had no evidence that the spill caused any fish kills. Tr. Trans. 365:23-367:9; 365:13-21. The only testing done on tissue from the dead fish showed no contaminants at harmful levels. Tr. Trans. 365:13-21; 2084:4-2085:5 (Dr. Slocomb); D-163; D-168. And Dr. Michel conceded at trial that the only waste water sample analyzed for benzene did not exceed the EPA ambient water quality standard for toxicity to aquatic life. Tr. Trans. at 369:3-25. In addition, it was undisputed at trial there was no post-spill reduction in the overall total of shrimp, crabs, and fish in the estuary. Tr. Trans. 2083:9-2084:3. While forty-three birds were observed to be oiled, three of which died, 2,000 or more un-oiled and unharmed birds were observed in the spill area at the time, evidencing that the oil did not pose a significant threat to birds. Tr. Trans. 2071:5-2072:3.

Though it largely abandoned this argument on appeal, the government reasserts on remand its claims that the oil spill injured residents located along the waterways. Gov. Br. at p. 46. But, at trial, plaintiffs failed to prove that the oil spill exposed the community to harmful levels of chemicals, as this Court confirmed in its Judgment, finding that the spill "thankfully, did not put public health and life at risk." Judgment at p. 17. As Fred Boelter, a certified industrial hygienist, and Angela Harris, a toxicologist, explained, all of the actual monitoring data at CITGO and in the community showed exposures below any health-based standards. Tr.

14 The government argues that CITGO's waste oil contained high levels of PAHS, which are toxic and persistent in the environment, implying that the oil had toxic effects on the environment. Gov. Br. at p. 45. But this ignores the results of the toxicity testing that was actually performed, which undisputedly showed no toxic effects on the environment.

Trans. at 2168:10-24; 2182:25-2183:6; 2185:1-14; 2255:2-2256:13; 2258:22-2259:3; 2259:19-2260:9; 2263:16-22; 2264:7-2265:16. The government fails to cite any expert evidence to the contrary, because their experts, Lyle Chinkin and William Perry, failed to present any reliable contrary evidence. Chinkin used an inapplicable model for estimating chemical exposures, which he admitted had never been validated for that purpose. Tr. Trans. at 2059:17-20 (Fred Boelter); 1055:4-1056:2. As such, his modeling results failed to match the real-world monitoring performed by CITGO and its contractors. Other evidence confirmed that people were not put at risk for overexposures. Benzene exposure tests on Coast Guard employees were normal; first responders Ronny Lovett and Steve Newman testified that the odor and fumes from the oil were not strong on the first day and that they suffered no health effects; and Mike Monroe testified that, out of nearly 1700 clean-up workers, only 15 people made health reports to the Unified Command, none of which related to the odor or fumes from the oil. Tr. Trans. at 1973:5-24 (Ronny Lovett); 2004:18-2005:17 (Mike Monroe); 509:9-16; 515:19-24 (Steve Newman); D-884.

While the harm caused by the spill was short-lived, CITGO will be required to pay for any damage caused to the environment and lost recreational use through the ongoing Natural Resource Damages Assessment conducted in cooperation with state and federal agencies. Tr. Trans. 374:6-375:14 (Dr. Michel); 2033:8-21 (Dr. Slocomb); *see* Gov. Br. at p. 46. In fact, CITGO would have already paid for these damages, but the government has refused to complete the damages assessment while this litigation is pending. Tr. Trans. at 2034:13-21. CITGO also has paid nearly $30 million to local plants for business interruption claims, showing that businesses directly affected by the spill received compensation. D-1855; *see, e.g.*, D-1342; D-

1346; D-1410-C; D-1534; D-1535. All of this evidence shows that the seriousness of the harm is a mitigating factor in determining a civil penalty.

C. Any Other Matters As Justice May Require

The Fifth Circuit upheld this Court's evaluation of "any other matters as justice may require." 723 F.3d at 553-54. Specifically, the Fifth Circuit held that this Court's conclusion "that it was only fair to view CITGO's role in the community as a whole, rather than limit its view to a single, extremely negative event . . . was not clear error." 723 F.3d at 553. While the government urges this Court to re-assess this factor, its arguments rest on the disputed assertion that CITGO failed to adequately maintain its facility, which, even if it were true, would be considered under other penalty factors and should not be counted twice. *See* Gov. Br. at pp. 48-49.

It was proper for the Court to consider the role CITGO plays in the local and state economies, including employing 1200 full-time employees and hundreds of contract employees. Tr. Trans. at 2846:6-24; *see United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 353 (E.D. Va. 1997) (considering defendant's efforts to connect town to sanitation district); *United States v. Sheyenne Tooling & Mfg. Co.*, 952 F. Supp. 1420 (D.N.D. 1996) (considering community impact if large penalty caused defendant to cut jobs). CITGO spends large sums in the State, pays taxes to Calcasieu Parish and to the State, and is a major supplier of petroleum products to Louisiana businesses. Tr. Trans. at 2846:18-2847:3. The government complains that these factors unjustly favor larger employers, but larger employers by necessity have a greater economic impact on the communities that surround them. *See Sheyenne Tooling & Mfg. Co.*, 952 F. Supp. at 1420. CITGO also supports many charitable causes, focusing on those who are

unable to help themselves, such as donating $5 million after Hurricane Rita to a health center for the disadvantaged in Lake Charles. Tr. Trans. at 2851:24-2856:4.

The Fifth Circuit also held that the Court's consideration of the injunctive relief it ordered was not clear error. This is sensible and appropriate, in light of the extensive and costly injunctive relief ordered. *See U.S. v. Ciampitti*, 615 F. Supp. 116, 124-25 (D.N.J. 1984) (holding in abeyance award of civil penalties pending implementation of injunctive relief, as defendant's good faith in performing clean-up "is a relevant factor in assessing the size" of the penalty). Indeed, doing so is consistent with the penalty factors' goals because it weighs deterrence and prevention of environmental violations with the impact on the violator and overall fairness. *See* 33 U.S.C. § 1321(b)(8) (directing district court to consider factors ranging from seriousness of harm to violator's ability to pay). This Court granted most of the government's requests for injunctive relief, ordering CITGO to (1) "perform sediment sampling in the Indian Marais to determine if there are any lingering effects from the spill"; (2) "conduct a storm water drainage area calibration study so that it may fully understand the flow burdens for its current storage and treatment capacity needs"; (3) construct a fourth storage tank; (4) install one additional API unit; (5) properly operate and maintain its oil skimming systems and all other equipment necessary to keep the treatment facility in compliance with all applicable laws, permits, and requirements; (6) install a fourth aeration tank; (7) evaluate effective COD reduction measures. Judgment at pp. 11-14. The government argued that it would be unfair to credit CITGO anything for the cost of this injunctive relief, as these construction projects should have been completed prior to the spill. Gov Br. at p. 49. But, as discussed above in the economic-benefit section, many of these improvements were not necessary to prevent the spill, and the Court made no finding that they were. As this Court said, "[t]he most important thing to do at this point in the situation is to

avoid it happening again." Judgment at p. 11. The injunctive relief and other measures CITGO has taken to improve its facilities are meant to do just that.

The government estimated that it would cost CITGO approximately $30 million to implement all of these measures, Tr. Trans. at 1438:5-13, and it will likely cost closer to $40 million. The government argues, with no support whatsoever, that if the Court reduces its penalty based on its consideration of this penalty factor, that reduction should not exceed five percent. Gov. Br. at p. 50. The Fifth Circuit gave this Court no such direction and, instead, affirmed this Court's consideration of the injunctive relief. When the cost of injunctive relief is added to the other costs CITGO incurred as a result of the spill, it shows no economic benefit to CITGO, provides additional incentive to prevent reoccurrence (and the improvements will help to prevent future spills), and further supports the monetary penalty already ordered by this Court.

D. Prior Violations

The Fifth Circuit asked for a re-evaluation of CITGO's history of prior violations. But this evidence does not support a different penalty. As set out above in the gross-negligence discussion, CITGO's prior violations were unrelated to the oil spill and were infrequent based on CITGO's 99% compliance rate.

The government seizes upon language from this Court's Judgment, holding that CITGO had operated in violation of state law for five years, and urges this Court to consider that finding as part of its penalty calculation under federal law. *See* Gov. Br. at p. 41; Judgment at p. 7. As the government acknowledges, though, the Court did not take this into account in its initial determination of the prior violations penalty factor. Nor is there any reason for it to do so now. Indeed, elsewhere in its brief the United States argues that the penalty paid by CITGO to the State of Louisiana for these prior violations ***should not*** be considered under the "other penalties

for the same incident" factor, because those penalties were "not for the spill but for prior violations of CITGO's operating *permit* before the spill." Gov. Br. at p. 58 (emphasis in original). The government wants to have it both ways – it would have this Court consider those violations as an aggravating factor under one factor yet ignore them as a mitigating factor under another. This is improper and inequitable because it would allow double punishment for the same conduct.

E. Ability to Pay

Although it did not raise this factor on appeal, the government asks this Court to reconsider CITGO's ability to pay in calculating a penalty. As this Court recognized in its Judgment, however, "simply because a violator has a significant amount of money, a Court should not impose a fine that is excessive in light of the violation." Judgment at p. 3. Even without a civil penalty, CITGO has every incentive to prevent a repeat of the 2006 spill. No further deterrence will be achieved by a greater penalty. CITGO's ability to pay a fine should not support an increase in the penalty already ordered by the Court.

F. Other Penalties For The Same Incident

CITGO paid a $13 million criminal fine and has now paid the State a $3 million civil penalty as ordered by this Court. The Court should consider these payments in connection with the economic-benefit calculation, as discussed above, or it could use its discretion to reduce any civil penalty based on the payments of other penalties. Most importantly, other penalties imposed on CITGO serve a deterrent purpose and show that CITGO has not benefitted financially from any alleged savings in delaying WWTU upgrades.

What is more, in taking into consideration the other penalties paid by CITGO for this incident, it should be clear that the $197 million civil penalty sought here is grossly

disproportionate to CITGO's conduct. If awarded, this penalty would be more than ***fifteen times*** greater than the criminal fine, $13 million, already imposed for the same spill.[15] And this is piled on top of the tens of millions of dollars in costs CITGO has already incurred as a result of the spill. This factor supports a much lower penalty than the government's vastly inflated and disproportionate proposal.

The government's position on economic benefit in this case is incongruous with its action in the criminal case. CITGO already paid one fine to the federal government based on economic benefit, and the amount of that fine was far more in line with this Court's penalty determination than the U.S.'s inflated demand here. The government's attempt to further increase the "civil fine" based on the same conduct for which CITGO was punished in the criminal action and using the same criteria, economic benefit, to do so subjects CITGO to double jeopardy. While the government argues that CITGO should be punished further, citing *Tull v. United States*, 481 U.S. 412 (1987), notably, the defendant in *Tull* was not subject to a previous criminal action.[16] Indeed, the government's requested penalty here is so excessive that it would violate CITGO's

15 Here, the criminal statute under which CITGO was sentenced provides that the penalty shall not exceed two times the defendant's economic benefit. See 18 U.S.C. § 3571(d) ("Alternative fine based on gain or loss.--If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.").

16 In reversing the district court and court of appeals, the Supreme Court in *Tull* determined that the government was imposing punishment through a civil action brought under the Clean Water Act and, consequently, the defendant was entitled to a jury trial under the Seventh Amendment.

constitutional rights under the Eighth Amendment's Double Jeopardy and Excessive Fines Clauses.[17]

CONCLUSION

For the reasons set out above, the $6 million civil penalty ordered by this Court was well supported by the evidence presented at trial and in line with other Clean Water Act jurisprudence. The government failed to present any evidence of least-cost alternative ways to prevent the spill, rendering its economic-benefit calculations legally deficient. Under the legally correct standard - least-cost means of preventing the spill - CITGO had relatively minimal economic benefit (and none when economic detriment is considered), which fully supports this Court's penalty determination. Moreover, CITGO's conduct was not grossly negligent: it built a state-of-the-art waste water treatment plant with excess tank capacity in 1994 and upgraded the unit over time as recommended by its consultants. Finally, the other penalty factors, including CITGO's proactive and successful response, as well as the minimal environmental impact of the spill, support the Court's original penalty.

17 *United States v. Ward*, 448 U.S. 242, 248-49 (1980) ("[W]here Congress has indicated an intention to establish a civil penalty, [the Court has] inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention."); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.").

Respectfully Submitted,

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